Supreme Court, U.S.
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No. 98-403

In The

Supreme Court of the United States

October Term, 1998

LURLENE MENCER,

Petitioner,

vs.

CLEVELAND HAMMONDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUES PRESENTED FOR REVIEW

1. Whether Petitioner meets the requirements of Rule 10 of the Rules of the Supreme Court of the United States which governs whether Petitions for Writ of Certiorari should be granted.

2. Whether the Supreme Court has previously established clear law regarding the jurisdiction of Appellate Courts to hear appeals from orders denying qualified immunity.

3. Whether Appellate Courts have jurisdiction to hear appeals from orders denying qualified immunity based upon the objective determination that an official's conduct violates clearly established law.

4. Whether or not a reasonable person who recommended 19 females out of 26 candidates for assignment to principalship positions would know that the failure to recommend one Black female to fill a principalship position violated the clearly established law based upon his statement that the system needed more male principals which statement was made immediately before he recommended the Black female for promotion, and two years before the assignments in question occurred.

5. Whether or not a reasonable person who recommended 18 Black persons out of 26 candidates for assignment to principalship positions would know that the failure to recommend one Black female to fill a principalship position violated the clearly established law based upon his statement acknowledging a desire to have a diverse workforce in response to the EEOC investigator's accusation that the system discriminated in favor of Blacks, when one of the people who was selected for the principal position plaintiff sought was Black.

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Lurlene G. Mencer

Cleveland Hammonds

TABLE OF CONTENTS

	Page
Issues Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Constitutional and Statutory Provisions Involved	1
Statement of the Facts and Case	1
Reasons for Denying the Writ	5
I. Petitioner Fails To Meet The Requirements Of Rule 10 Of The Rules Of The Supreme Court Of The United States.	5
II. The Law Is Clear Regarding The Jurisdiction Of Appellate Courts To Hear Appeals From Orders Denying Qualified Immunity.	6
A. The Eleventh Circuit's Decision Was Not Based Upon The Sufficiency of the Evidence Standard	6
B. The Eleventh Circuit's Decision Does Not Revert Back To the Subjective Test Rejected In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).	10

Table of Contents

Page

C. The Eleventh Circuit's Decision Is Not In Variance With The Separability Requirement of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 14

D. The Inherent Delay Caused By Interlocutory Appeals Is Not A Sufficient Basis To Grant The Writ Of Certiorari 15

III. The Eleventh Circuit Correctly Decided That Hammonds Was Entitled To Qualified Immunity Under The Governing Law. 16

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Creighton, 483 U.S. 635 (1987) 13, 16, 17, 19

Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989) 17

Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834 (1996) 6, 9, 10, 12, 14, 15, 16

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 14, 15

Crawford-El v. Britton, __ U.S. __, 118 S. Ct. 1584 (1998) 10, 11, 12, 19

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 10, 12, 15, 16, 17

Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151 (1995) 4, 6, 7, 8, 9, 10, 12, 14, 15

Lassiter v. Alabama A & M University, 28 F.3d 1146 (11th Cir. 1994) 16, 17, 19

Mitchell v. Forsyth, 472 U.S. 511 (1985) 14, 16

Muhammad v. Wainwright, 839 F.2d 1422 (11th Cir. 1987) 17

Post v. City of Fort Lauderdale, 7 F.3d 1552 (11th Cir. 1993), *modified*, 14 F.3d 583 17

Table of Cited Authorities

Page

Siegert v. Gilley, 500 U.S. 226, (1991), *reh'g. denied*, 501 U.S. 1265 (1991) 11, 12, 16

Washington v. Davis, 426 U.S. 229 (1976) 19

Statutes:

28 U.S.C. § 1291 15

29 U.S.C. § 621, *et seq.* 3

42 U.S.C. § 1981 3

42 U.S.C. § 1983 ..... 1, 3, 12, 18, 19

42 U.S.C. § 2000, *et seq.* 3

United States Constitution:

Fourteenth Amendment 1, 3

Rules:

Supreme Court Rule 10 ..... i, 5

Supreme Court Rule 10(a) 5

Supreme Court Rule 10(c) 5

Respondent respectfully requests that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

OPINIONS BELOW

Respondent adopts Petitioner's Statement of OPINIONS BELOW.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

2. 42 U.S.C. § 1983.

STATEMENT OF THE FACTS AND CASE

The Petitioner, Lurlene Mencer, ("Mencer", "plaintiff", or "petitioner") a Black female, was employed as a teacher by the Birmingham Board of Education in 1964. After holding various teaching positions within the system, the new Superintendent of the Birmingham Board of Education, Dr. Cleveland Hammonds, ("Hammonds" or "defendant") a Black male, recommended her for a promotion to an assistant principalship position in 1989. Pursuant to his recommendation she was appointed to the position by the Board. The next year Hammonds recommended and the Board appointed Mencer to fill another assistant principalship position. In 1990 Hammonds also recommended and the Board selected Mencer to be promoted to an interim principal position. The interim position was created because another principal took a leave of absence.[1]

1. Submission of Evidence In Support Of Defendant's Summary Judgment filed in the District Court on June 16, 1995.

In April of 1992 the principal who had taken a sabbatical returned to the school system and Mencer returned to her previous position as assistant principal. In June of 1992 two principalship vacancies became available. Mencer applied for the positions but was not selected. A white male, Kenneth Walker, was promoted to one of the positions and a Black male, Dave Porter, was promoted to fill the other.[2]

Hammonds' articulated reason for not recommending Mencer is undisputed. Succinctly stated, after Mencer's service as interim principal he had questions about her ability to handle disciplinary problems, administrative affairs, staff relations and her interactions with parents and students. By contrast Walker, the white male selected to fill one of the vacancies, had had success in these areas while assistant principal at Huffman High School and evidenced sound alternatives and suggestions for confronting problems and handling the responsibilities of principal during his interview with Dr. Hammonds. Similarly Porter, the Black male, was recommended by Hammonds based upon his excellent record as an assistant principal, his record as a teacher, recommendations submitted, and his interview which revealed strength in discipline, supervision and administrative skills. Based upon these reasons, Dr. Hammonds did not recommend Mencer.[3]

Mencer subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on November 2, 1992. Therein she alleged that the failure to promote her to the principalship positions constituted discrimination based upon her race, sex, and age. Dr.

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2. Submission of Evidence In Support Of Defendant's Summary Judgment Motion filed in the District Court on June 16, 1995.

3. Submission Of Evidence In Support Of Defendant's Summary Judgment Motion filed in the District Court on June 16, 1995.

Hammonds responded to the charge by submitting a position statement denying discrimination and explaining the basis for the selections and submitting and exhibit which showed that Blacks and females constituted a majority of the principals in the system.[4] Upon receipt of this information, the EEOC investigator accused Dr. Hammonds and the Board of giving preferential treatment to Blacks since there were so many more Black principals than white ones. Hammonds responded in a second letter to the noted Black/white ratio by explaining that the Board attempted to maintain a diverse workforce by retaining whites.[5]

The EEOC issued a right to sue letter and Mencer filed a complaint against the Birmingham Board of Education on June 21, 1994.[6] Mencer alleged that she had been denied promotions within the school system based upon her sex, age, and race in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000, *et seq.*, The Age Discrimination Act, 29 U.S.C. § 621, *et seq.*, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Mencer subsequently amended her complaint on August 1, 1994 to add Dr. Cleveland Hammonds as a defendant in his individual and official capacity. Dr. Hammonds filed a summary judgment motion on the grounds that he was entitled to qualified immunity because the particular circumstances with which he was confronted did not constitute a violation of clearly

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4. During the relevant time period between 1989 and 1994, 26 people were recommended by Hammonds to fill principalship positions. Eighteen of those individuals were Black and 8 were white. Nineteen were women and 7 were men.

5. *See* Submission Of Evidence In Support Of Defendant's Motion For Summary Judgment filed in the District Court, June 16, 1995.

6. The Board of Education is not a party to this petition.

established statutory or constitutional rights of which a reasonable person would have known.

The District Court entered summary judgment against plaintiff on her age discrimination and substantive due process claims but denied that Dr. Hammonds was entitled to qualified immunity finding that discrimination in promotions based upon race and gender violates the clearly established law. Petitioner's Brief, App. C, 19a. The Court noted that the plaintiff had produced sufficient evidence that Dr. Hammonds' conduct violated the equal protection clause, but it did not make findings of fact. Petitioner's Brief, App. C, 20a. Consequently, the court did not undertake the required analysis to determine whether the circumstances that Dr. Hammonds was confronted with violated clearly established law. Petitioner's brief App. C, 16a-20a.

Defendant filed a Motion To Reconsider which was denied. Then Defendant filed an appeal of the denial of qualified immunity to the Eleventh Circuit. Because the District Court did not make findings of fact the Eleventh Circuit undertook this onerous task pursuant to the authority of *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151 (1995). It assumed the facts in the light most favorable to plaintiff to support the District Court's finding that Hammonds violated clearly established law. *Johnson*, 515 U.S. at 318, 115 S. Ct. at 2159. Accordingly, the Eleventh Circuit identified the following salient facts: (1) that plaintiff and Dr. Hammonds had a conversation two years before she was denied the promotions in question wherein they discussed the need for better discipline in the schools and Dr. Hammonds allegedly stated that the system needed more male principals;[7] and (2) that Dr. Hammonds responded to the EEOC

7. Shortly after the statement was made, Hammonds recommended Mencer for an assistant principalship position. He subsequently recommended her for promotion to interim principal.

investigator's accusation that the school system gave preferential treatment to Blacks because the majority of the principals employed were Black by stating that the system attempted to be mindful of the Black/white ratio and retain white principals. (Petitioner's Brief, App. 4a-6a, 10a, 11a).

Assuming the facts in the light most favorable to plaintiff, the Eleventh Circuit reversed the District Court's decision and found that Hammonds was entitled to qualified immunity. Petitioner filed a Petition for Rehearing and Suggestion of Rehearing En Banc was which denied. The Petitioner then filed the extant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILS TO MEET THE REQUIREMENTS OF RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

A review by the Supreme Court on a Writ of Certiorari is discretionary and will only be granted for "compelling reasons." Rule 10 of the Rules of the Supreme Court of the United States. Rule 10 sets forth the guidelines considered by this Court in determining whether to issue a writ of certiorari. These include cases where a Court of Appeals' decision conflicts with a decision of a Court of Appeals of another circuit, or where the Court of Appeals has so departed, or sanctioned such a departure by the District Court, from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power. (Rule 10(a)) Rule 10(c) adds as a basis for consideration — cases where the Court of Appeals has decided an important federal question in a way which conflicts with relevant decisions of this Court. Rule 10 concludes with the

admonition that the "writ of certiorari is rarely granted when an asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law".

Although Petitioner alleges there is a conflict within the Circuits regarding the governing law, as explained *infra* in II, the Supreme Court has dispositively addressed the issues in question. Therefore, the controlling law is clear. The Eleventh Circuit Opinion is in accordance with the governing Supreme Court law. The gravamen of Petitioner's arguments questions the Eleventh Circuit's findings of fact and the application of existing law. Inasmuch as the governing rules admonish that writs are rarely granted based upon an alleged misapplication of existing law and disagreement with factual findings, Petitioner simply fails to assert a sufficient basis or a compelling reason to grant the writ of certiorari.

II.

THE LAW IS CLEAR REGARDING THE JURISDICTION OF APPELLATE COURTS TO HEAR APPEALS FROM ORDERS DENYING QUALIFIED IMMUNITY.

A. The Eleventh Circuit's Decision Was Not Based Upon The Sufficiency of the Evidence Standard

Although petitioner alleges that there is a split in the circuits regarding whether an interlocutory appeal can be taken from a denial of summary judgment based solely on an "insufficiency of the evidence standard," there should not be any confusion because this question has been dispositively addressed by the Supreme Court in *Johnson*, 515 U.S. 304, 115 S. Ct. 2151 (1995) and clarified in *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834 (1996). The only confusion is engendered by petitioner's

mischaracterization of the Eleventh Circuit's ruling in this case. Petitioner misrepresents that the Court of Appeals held that interlocutory appeals were "permissible when the question of qualified immunity turns on the sufficiency of the evidence of intent to discriminate." Petitioner's Brief, page 6. In fact, as the appellate court's decision clearly states it was Mencer who characterized the jurisdictional issue as turning on the sufficiency of the evidence. "As a preliminary matter Mencer challenges our jurisdiction to hear this case. She claims that the District Court's denial of qualified immunity was based on an issue of 'evidence sufficiency' and not an issue of law . . . We disagree . . . with Mencer's interpretation of the District Court's order . . ." *See* Petitioner's Brief, App. A, 6a, 7a.

In part this characterization must have been designed so that petitioner could disingenuously argue that the Court of Appeal's decision was in variance with this Court's decision in *Johnson*. However, this argument in and of itself underscores petitioner's misconstruction of the holding in that case. In *Johnson* the Supreme Court held that a

> defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial. *Johnson,* 515 U.S. at 319-20, 115 S. Ct. at 2159.

The petitioners in *Johnson* asserted a qualified immunity defense thereby qualifying the case technically as a "qualified immunity case," but their summary judgment motion was not based upon this ground. They appealed the District Court's decision on the basis that the record did not contain a "scintilla of evidence" that they did what they were accused of doing, or stated another way, that " the record lacked sufficient evidence

even to raise a 'genuine' (*i.e.*, triable) issue of fact." *Johnson*, 515 U.S. at 308, 115 S. Ct. at 2154. This Court concluded that a denial of summary judgment based upon a question of evidence sufficiency (as distinguished from a determination regarding qualified immunity vel non) was not a final appealable order. *Id.* at 2159.

At the outset, it should be noted that the District Court's holding in this case was not based upon a finding that Dr. Hammonds was not entitled to summary judgment because there was a genuine issue of fact for trial; thus the petitioner's characterization of the jurisdictional issue as turning on the "sufficiency of the evidence" is clearly misleading. The District Court found that the law was clearly established at the time Dr. Hammonds made his decision to select a Black man and a white man to fill the positions Mencer sought. The Court went on to add that plaintiff had "produced sufficient evidence of conduct violative of the equal protection clause on the part of Dr. Hammonds." Petitioner's Brief, App. C, 20a. This was mere *dicta* and clearly far from a holding that qualified immunity was denied because of an issue of fact.

In accordance with this Court's legal reasoning and analysis, the case at bar is distinguishable from *Johnson* and the Eleventh Circuit properly exercised jurisdiction over the District Court's finding that Dr. Hammonds' conduct in not recommending the petitioner for the promotions in question violated clearly established law. Assuming arguendo, however, that there is a mixed question of evidence sufficiency (which is unreviewable) and the reviewable question of whether a "given set of facts violates clearly established law," the *Johnson* opinion found that the reviewing Court should take as given the facts assumed by the District Court when it denied summary judgment to determine the legal issue of whether conduct violated clearly established laws. *Johnson*, 515 U.S. at 319,

115 S. Ct. at 2159. In the case at bar the District Court did not specify its findings of fact so the Eleventh Circuit assumed the facts that the plaintiff proffered as supporting a violation of clearly established law despite Mencer's blatant misrepresentations to the contrary. *See Johnson*, 515 U.S. at 319, 115 S. Ct. at 2159. Petitioner's Brief at 16. In viewing the facts in the light most favorable to the plaintiff the Eleventh Circuit found that: (1) Dr. Hammonds stated that the system needed more male principals;[8] and (2) that Dr. Hammonds wrote a letter to the EEOC which acknowledged the black/white ratio of principals in the system and expressed a desire to retain white principals.[9] Petitioner's Brief, App. A 5a. Assuming these facts as true, the Court of Appeals then held that no reasonable juror could find that Hammonds violated the clearly established law. Petitioner's Brief, App. A 10a, 11a. This analysis and review was in accordance with the instructions and precedent of the Supreme Court and thus the Eleventh Circuit's opinion should be upheld.

This Court's subsequent decision in *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834 (1996) provides crystallizing clarification and indisputable support for the Eleventh Circuit's jurisdiction over this case. *Behrens* involved the more "serious problem" that the *Johnson* decision speculated about wherein there is an appeal based upon the denial of qualified immunity but material fact issues remain for trial. There this Court rejected the argument that the appeals court did not have jurisdiction under *Johnson* because the District Court's denial

8. This conversation occurred two years before the promotions in question and immediately before Hammonds recommended that plaintiff be promoted to the position of assistant principal. He also recommended that she be promoted to interim principal after he made the alleged statement.

9. The letter was in response to that agency's accusation that the system preferred Blacks over whites when making principal assignments because the majority of principals in the system were Black.

of summary judgment rested on the grounds that material issues of fact remained in the case. The Court explained that *Johnson* simply held "that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case;" and "reaffirmed that summary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity." *Behrens*, 516 U.S. at 312, 116 S. Ct. at 842 (citations omitted). In this case, Dr. Hammonds did not assert a qualified immunity defense but base his summary judgment on evidence insufficiency. Rather, here Dr. Hammonds' motion was based on entitlement to qualified immunity and the denial of same was based upon the resolution of a question of law; whether qualified immunity existed or whether Hammonds' conduct violated clearly established rights. Hence, under *Johnson* and *Behrens* the Eleventh Circuit properly had jurisdiction over the appeal and the writ should be denied.

B. The Eleventh Circuit's Decision Does Not Revert Back To the Subjective Test Rejected In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Petitioner further erroneously represents that the Court of Appeals' decision applied a standard which made the dispositive inquiry for summary judgment purposes, the subjective intent of the public official rather than the objective reasonableness standard of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Petitioner's Brief, page 6. Petitioner contends that this standard is not only in variance with *Harlow*, but also with this Court's recent decision in *Crawford-El v. Britton*, __ U.S. __, 118 S. Ct. 1584 (1998). Once again petitioner misreads the law. The seminal case of *Harlow* held

> that government officials performing discretionary functions generally are shielded from liability for

> civil damages insofar as their conduct does not violate clearly established statutory and constitutional rights of which a reasonable person would have known.

457 U.S. at 818. In *Crawford-El* this Court distinguished between the recognized need to protect public officials from the trial of baseless claims and changing the nature of the plaintiff's burden of proving a constitutional violation. The Court's focus in reversing the lower court's decision in *Crawford-El* was on that court's revision of procedural rules which changed the plaintiff's standard of proof to the clear and convincing standard of proof. The Court found no support for this change under the governing law and declined to revise the plaintiff's burden of proof. It is important, however, that the Court distinguished between the clear and convincing burden of proof which is designated as a procedural rule and the substantive qualified immunity defense inquiry which by necessity involves a determination of the elements of the law alleged to have been violated. *Id.* at 1596, 1597.

In support of its contention that the Eleventh Circuit's decision was erroneously based upon a determination of Hammonds' subjective intent, petitioner cites the following statement in *Crawford-El*: "Evidence concerning the defendant's subjective intent is simply irrelevant to the defense." *Crawford-El*, __ U.S. __, 118 S. Ct. at 1592. Petitioner significantly ignores that the Court explained that while bare allegations of malice (turning on subjective intent) would not suffice to overcome a qualified immunity defense, "it is equally clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated." *Id.* In reconciling these two positions the Court noted its previous ruling in *Siegert v. Gilley*, 500 U.S. 226, (1991), *reh'g. denied*, 501 U.S. 1265 (1991), wherein it pronounced that

> a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. 500 U.S. at 232.

Therefore, at the outset, if a defendant raises the defense of qualified immunity, the threshold questions to be determined by the reviewing Court are what the current applicable law is and whether at the time of the public official's conduct, the law was clearly established. *Harlow*, 457 U.S. 800, 818; *Siegert*, 500 U.S. 226, 232, 233. Thus the Court must analyze the elements of the case. Intent is an element of proof of discrimination under plaintiff's § 1983 claims. Here, the Eleventh Circuit Court of Appeals undertook to review the record as instructed by *Johnson* and made a determination that no reasonable juror could find that Dr. Hammonds intended to discriminate against Ms. Mencer based upon her race or gender assuming the facts in the light most favorable to her. Concomitantly, as a matter of law, the Court found that Hammonds met the objective reasonableness standard under *Harlow* and his conduct did not violate clearly established law. Therefore, in accordance with *Crawford-El*, *Behrens*, *Johnson* and *Harlow*, the Eleventh Circuit's decision is due to be upheld and the Petition for Writ of Certiorari should be denied.

The petitioner's considerable confusion about whether the Eleventh Circuit's ruling was based upon the subjective intent standard or the objective *Harlow* standard seems based in part on counsel's merger of the following queries: (1) whether the law is clearly established; and (2) whether the defendant's conduct violated clearly established law. Accordingly, counsel concludes that since Hammonds concedes that the law is clearly established that employment decisions cannot be based upon

race or gender, he cannot argue about whether under the circumstances in this case, his conduct violated clearly established law. Even though petitioner erroneously merges these issues, this Court has recognized their distinctness. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court found that although it was indisputable that the right to be free from warrantless searches absent probable cause or exigent circumstances was clearly established it was not clearly established that the particular circumstances confronting the defendant in that case constituted a violation of that right. *Anderson*, 483 U.S. 635, 640, 641. That decision acknowledged that makir the legal, objective determination of whether the specific circumstances or conduct constitute a violation of clearly established law, often requires an examination of the understanding of the actor and the underlying facts, but the Court stated that this does not convert the inquiry into one of subjective intent. *Id.* at 641. There, the Court rejected the argument proffered by Mencer and held that in reaffirming the well established principles of qualified immunity, the law requires that a public official or government actor be allowed to argue that his conduct did not violate clearly established law. *Id.* Assuming the facts in the light most favorable to plaintiff, given the circumstances with which Hammonds was confronted, the Court of Appeals held that no reasonable juror could find that he violated the clearly established law. Petitioner's Brief, App. A 10a, 11a. Thus, under *Anderson* this examination and analysis did not convert the inquiry into one of subjective intent.

It follows that the Petitioner's paranoia that the Eleventh Circuit's holding in this case will open the floodgates for appeals of intent based claims is unjustifiable. The Eleventh Circuit's decision merely follows the settled law that courts of appeals may entertain jurisdiction over orders denying summary judgment based upon the legal objective determination of

entitlement *vel non* to qualified immunity. Accordingly, petitioner's subjective intent argument cannot serve as the basis for overturning the Eleventh Circuit's decision and is not grounds for granting the writ.

C. The Eleventh Circuit's Decision Is Not In Variance With The Separability Requirement of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Petitioner also argues that because the Eleventh Circuit entertained jurisdiction over an interlocutory order denying qualified immunity the separability-component of an appealable decision mandated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) has been eroded. Petitioner's Brief at 9, 10, 11. Again this issue has already been dispositively addressed and explained by this Court in *Mitchell v. Forsyth*, 472 U.S. 511, 525-528 (1985); *Johnson*, 515 U.S. 304, 308-315, 115 S. Ct. 2151, 2154-2157 and *Behrens*, 516 U.S. 299, 304-313, 116 S. Ct. 834, 838, 839, 841, 842. In *Mitchell*, the Court did an extensive analysis of the *Cohen* conclusiveness and separability criteria for determining appealability. Based upon this analysis the Court summarily concluded: "The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements." 472 U.S. at 527. In reaching this determination the Court explained that

> it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct, that *a claim of immunity is conceptually distinct from the merits* of the plaintiff's claim that his rights have been violated.

Id. at 527, 528. Significantly, the Court elucidated the axiomatic, "to be sure, the resolution of these legal issues will

entail consideration of the factual allegations that make up the plaintiff's claim for relief." *Id.* at 528. It then held that the District Court's denial of the claim for qualified immunity is an appealable decision under 28 U.S.C. § 1291. *Id.* at 530. The Court's erudite reasoning was quoted and adopted at length in the subsequent decisions of *Johnson* and *Behrens*. The Court's pronouncement that the denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets the separation requirement of *Cohen* is unequivocal. We cannot understand how Petitioner misapprehends the settled law and thinks that the issue has not been decided. Be that as it may, this Court has clearly spoken on several occasions. The issue has been decided. Therefore, the writ should be denied.

D. The Inherent Delay Caused By Interlocutory Appeals Is Not A sufficient Basis To Grant The Writ Of Certiorari

Finally, petitioner recaps the progression of the case to support her petition for the writ.[10] She concludes that but for Dr. Hammonds interlocutory appeal, her claims would have been resolved by trial several years ago. First, petitioner has no way of knowing, giving the crowded dockets of the federal courts when her case would have been tried. Secondly, this Court summarily dismissed the delay argument in *Behrens* and reaffirmed that a decision denying qualified immunity based upon an issue of law is immediately appealable. *Behrens*, 516 U.S. 299, 310, 311, 116 S. Ct. 834, 840, 841. It has been well settled by this Court that the right to the shield of qualified immunity is a shield not only from going to trial but also was intended to shield the public official from the expense and burden of discovery and trial preparation and the disruption of the performance of the functions of the office. *Harlow*, 457

10. She filed her EEOC charge almost six years ago on November 2, 1992 and filed her lawsuit more than four years ago on June 21, 1994.

also Mitchell, 472 U.S. 511, 526; *Siegert v. Gilley*, 500 U.S. 226, 233. Under the erudite reasoning underlying the purpose of qualified immunity, it is Dr. Hammonds who has been unfairly subjected to the expense of litigation, and discovery given his established entitlement to qualified immunity. Thus, this last argument is also insufficient to compel the Court to grant the Writ of Certiorari.

III.

THE ELEVENTH CIRCUIT CORRECTLY DECIDED THAT HAMMONDS WAS ENTITLED TO QUALIFIED IMMUNITY UNDER THE GOVERNING LAW.

Dr. Cleveland Hammonds is clearly entitled to qualified immunity under the governing law. *Harlow*, 457 U.S. 800; *Mitchell*, 472 U.S. 511; *Anderson*, 483 U.S. 635; *Siegert*, 500 U.S. 206; *Behrens*, 516 U.S. 299, 116 S. Ct. 834; *Lassiter v. Alabama A & M University*, 28 F.3d 1146 (11th Cir. 1994). The doctrine of qualified immunity was intended to protect government officials from being subjected to suit and the concomitant burden, expense and harassment associated with litigation which would "dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the unflinching discharge of their duties." *Harlow*, 457, U.S. 800 at 813 (Citations omitted) Qualified immunity from personal liability is the rule rather than the exception. It is only in the rarest of cases where the shield of immunity is denied or should be denied to public officials. *Harlow*, 457 U.S. 800, 818; *Lassiter*, 28 F.3d 1146, 1149. The governing law dictates that a public official shall be entitled to qualified immunity in the execution of the performance of duties requiring his/her discretionary judgment if his/her conduct does not violate any clearly established constitutional or statutory rights of which a reasonable person would have known. *Harlow*, 457 U.S. 800,

818. The Supreme Court has instructed that plaintiffs may not satisfy their burden of proving a violation merely by referring to general rules and to the violation of abstract "rights," but rather must prove that the defendant's conduct under the specific circumstances violated the clearly established rights. *See Anderson v Creighton*, 483 U.S. 635 at 641 (1987) Accordingly, the Eleventh Circuit has followed this sage directive. *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987) ("General propositions have little to do with the concept of qualified immunity."); *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989) ("The line is not to be found in abstractions — to act reasonably, to act with probable cause, and so forth — but in studying how these abstractions have been applied in concrete circumstances."; *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583; ("If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant."); *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1150 (11th Cir. 1994) ("For qualified immunity to be surrendered, pre-existing law must dictate, that is truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law under the circumstances.")

The plaintiff's claims that Dr. Hammonds discriminated against her seem to be principally founded on a letter that he wrote to an EEOC investigator and statements that he made to plaintiff prior to recommending her for promotion. In the letter to the EEOC, Hammonds responded to the investigator's accusation that the system discriminated in favor of Blacks because there were so few white principals. Hammonds' response attempted to rebut the accusation of reverse discrimination by advising that the system was attempting to maintain a diverse workforce by retaining whites as principals.

Plaintiff further contends that she had a conversation with Dr. Hammonds about better discipline in the schools wherein defendant stated that the system needed more male principals.[11] There is no question that Dr. Hammonds was exercising his discretionary duties in formulating recommendations to fill principalship vacancies to submit to the Board. There is also no dispute that it is clearly established that race and sex discrimination are illegal. But, the law is not clearly established that selecting the person deemed best suited for a position while also being concerned about maintaining diversity in the work force or discipline in the system is violative of § 1983.

Plaintiff has pointed to no case authority involving circumstances where a school official has been held liable for discriminating against a Black person for choosing the applicant who was deemed to be best suited for a vacant position because he asserted a defense in response to an unrelated accusation of discrimination against whites. As the Eleventh Circuit said, there is no way evidence supporting that Hammonds' discrimination in favor of Blacks "could serve as a basis for finding that Hammonds intended to discriminate against Mencer, who is Black." Petitioner's Brief, App. 10a. Likewise, Mencer has not pointed to any authority holding that acknowledging the need for more male principals in an unrelated conversation, coupled with the fact that Dr. Hammonds later recommended her for a promotion to fill an assistant principalship vacancy constitutes a violation of constitutional or statutory law.

It is also quite significant that during the relevant time period between 1989-1994, of the 26 people recommended by Hammonds to fill principalship positions 18 were Black and

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11. Shortly thereafter, Dr. Hammonds recommended Mencer for a position as assistant principal, and subsequently recommended her promotion to interim principal.

19 were women. The Supreme Court has pronounced that when intent is an element of a constitutional violation, as in a § 1983 case, the focus is on the intent to disadvantage members of the class rather than the intent to harm a particular individual. *Crawford-El*, __ U.S. at __, 118 S. Ct. at 1594, citing *Washington v. Davis*, 426 U.S. 229, 239-248 (1976). Given the absence of earlier concrete and factually defined legal precedent, the law or rule which plaintiff's proffers is not clearly established. *Anderson*, 483 U.S. 635, 640, 641; *Lassiter*, 28 F.3d 1146, 1149. Thus, Dr. Hammonds is entitled to qualified immunity.

CONCLUSION

Based upon the foregoing reasons and authority, respondent Hammonds respectfully requests that this honorable Court deny Mencer's Petition for a Writ of Certiorari.

Respectfully submitted,

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